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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1075 97

SAMUEL J. KATZBERG, LOUIS HAIG AND JACOB F. SCHMITT,

Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

DAVID STECKLER,
Counsel for Petitioners.

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THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

To the Honorable the Supreme Court of the United States:

The petition of Samuel J. Katzberg, Louis Haig and Jacob F. Schmitt, respectfully shows:

1. They are citizens of the United States and reside in the City and State of New York.

2. This petition seeks a review of a decision of the Court of Claims of the United States, sustaining a demurrer by the defendant to a petition filed by the petitioners in that court for the recovery of a reward offered by the Commissioner of Internal Revenue, and ordering the dismissal of the petition.

3. The ground upon which the petition was dismissed was that it did not set forth facts furnishing any ground of relief against the United States, in that the offer of reward

did not state a definite sum offered by the defendant, and therefore no contract arose from the offer of reward and the giving of the information by the petitioners. The decision was filed March 3, 1941, and is reported in Case No. 45,289 March 3, 1941 (91 Ct. Cls. —).

Statement.

4. The petitioners in the court below alleged that they were entitled to recover from the defendant compensation in excess of $5,000 for furnishing information to the defendant which led to the detection and punishment of Isidore Goldberg and others named in the petition, for violating the Internal Revenue laws, and the recovery by the defendant of a sum in excess of $50,000 in income taxes of which the treasury was defrauded.

5. The statute under which the reward was offered is Section 1242 of Title 26 of the United States Code, Section 3463 Revised Statutes, reading as follows:

> "The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting or bringing to trial and punishment persons guilty of violating the Internal Revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided by law."

6. Pursuant to said statute the Commissioner of Internal Revenue promulgated Department Circular No. 147 of 1899, known as "Internal Revenue, No. 99-5th Revision." Its material parts are as follows:

> "Rewards for information leading to the Detection and Punishment of Persons violating the Internal Revenue Laws:
>
> "Under and by virtue of the provisions of Section 3463 of the Revised Statutes of the United States, which

authorize the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to pay such sums as he may deem necessary, not exceeding in the aggregate the sum appropriated therefor, for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at violations of the same, in cases where such expenses are not otherwise provided for by law, I do hereby, with the approval of the Secretary of the Treasury, offer for information given by persons other than officers of internal revenue, or persons appointed or employed in, or acting in connection with, the Internal Revenue Service, that shall lead to the detection and punishment of persons guilty of violating the internal revenue laws, or conniving at the same, whether such punishment be by fine or other pecuniary mulct or penalty, or by forfeiture of property, such reward as the Commissioner of Internal Revenue may deem suitable, but in no case exceeding 10 percent of the net amount of fines, penalties, forfeitures, and taxes, which by reason of said information shall be recovered by suit or otherwise and actually paid to the United States, or of any sums which shall be accepted in compromise by the Commissioner of Internal Revenue and received by the United States.

* * * * * * *

"The rewards hereby offered must be understood to be limited in their aggregate to the sum appropriated therefor.

* * * * * * *

"Claims for reward under the provisions of this circular should be made on Form No. 211, which will be furnished by Collectors of Internal Revenue on request therefor.

D. H. BLAIR,
Commissioner.

Approved,
A. W. MELLON,
Secretary of the Treasury."

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7. It is to be noted that Section 3463 of the Revised Statutes does not authorize or empower the Commissioner of Internal Revenue to fix a maximum of compensation, nor that the same shall be based upon any recovery of fines, penalties, forfeitures or taxes, which by reason of the information furnished might be recovered by the Commissioner, except that it fixes the limit as "such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary".

8. By Act of Congress of March 15, 1934, Congress appropriated to the Bureau of Internal Revenue $100,000 for the year ending June 30, 1935, to pay "for detecting and bringing to trial persons guilty of violating the internal revenue laws, including payments for information leading to the detection of such violators".

9. The petition, after setting forth the statute and the substance of the circular, alleged that for some years prior to 1934, Isidore Goldberg and two of his companies were engaged in the wholesale millinery business and were importing merchandise, and that in making these importations were engaged in cheating and defrauding the defendant out of its customs and internal revenues to the defendant's detriment in large and substantial sums; that on November 27, 1934, the petitioners gave original information to a customs officer at New York and to the Secretary of the Treasury of these frauds on the customs, and that at their request and in the due course of his procedure, a customs officer at the same time notified the Internal Revenue office of the frauds with the view of investigating the same; that in January 1935, the petitioners orally and in writing again advised the customs officers and the Intelligence Bureau of the Collector of Internal Revenue in New York, that the importers had not only been guilty of frauds on the customs, but that in order to cover up such frauds had committed

frauds upon the internal revenues of the defendant. The petition specifically referred to the income tax returns filed by I. Goldberg, Inc. for the years 1932 and 1933, I. Goldberg & Sons for the years 1933 and 1934, and Eigee Millinery Corp. and I. Eihner (R. 2-3).

10. The petition also alleged that the information thus given led to the recovery by the defendant of customs duties unlawfully withheld, by reason of which the petitioners filed a claim for reward under Sec. 619 of the Tariff Act of 1930, which claim was allowed and partly paid by the Secretary of the Treasury; that the information so furnished to the defendant's officers also led to the detection and punishment of the persons guilty of violating the Internal Revenue laws and to the recovery of fines, penalties, forfeitures and taxes; that among the sums so recovered was the sum of approximately $50,000 received by transfer from the Collector of Customs to the Commissioner of Internal Revenue of refunds of customs duties to which such importers were entitled to receive from defendant (R. 3).

11. The petition also alleged that about January 18, 1937, petitioners made claim for the reward offered by the Commissioner of Internal Revenue; that the Commissioner of Internal Revenue disallowed and rejected the claim without notice or hearing, despite the fact that petitioners' claim for customs reward had been allowed; and that such disallowance and rejection were arbitrary and capricious.

12. Notwithstanding the fact that the circular letter of the Commissioner of Internal Revenue offered a sum not "exceeding 10%" of any recovery actually paid to the United States, the Court below determined that "no definite or ascertainable sum was offered, and therefore no contract arose from the offer of reward and the giving of information by plaintiffs." Its decision was based upon a prior

decision made by the Court below in the case of Abraham L. Gordon, Case No. 45170, decided by the Court of Claims February 3, 1941 (91 Ct. Cls. —), where the precise question was presented.

Questions Presented.

13. The questions presented are:

(a) Whether the contract was void for want of definiteness in failing to state a definite sum offered by way of reward?

(b) Whether the petitioners were not entitled to recover upon quantum meruit for their services even if the contract was lacking in definiteness?

(c) Whether the petition below sets forth sufficient grounds entitling the petitioners to relief against the respondent?

Reasons for Allowance of Writ.

14. The reasons relied on by petitioners for allowance of the writ are as follows:

(a) The policy of the Treasury Department from time immemorial has been to offer rewards for the detection and punishment of violators of the customs and internal revenue laws in order to encourage informers to aid the government in protecting its revenue, and in the case of the customs a specific reward of 25% of the amount recovered is provided for in tariff acts running back many generations, the latest of which is the Tariff Act of 1930 (Sec. 619). In the case of internal revenue, the statute (Sec. 3463 Revised Statutes) does not specify any particular sum, leaving it to the Commissioner, with the approval of the Secretary of the Treasury, to pay rewards not exceeding the sum appropriated by Congress therefor. However, the Commissioner

of Internal Revenue, instead of fixing the reward in a specific sum, stated in his circular letter that it shall be such sum as he shall deem suitable, "in no case exceeding 10% of the net amount of fines, penalties, forfeitures and taxes * * * recovered by suit or otherwise and actually paid to the United States."

(b) The Commissioner of Internal Revenue for more than fifty years has generally paid the maximum of 10%, and the public at large has so understood the circular. Certainly the public has understood the Commissioner's circular letter to mean that a reward would be paid for information furnished to him by the informer, and that he would not, after receiving the information, tell the informer that the offer of reward was void and unenforceable for indefiniteness.

(c) There are many claims for reward filed with the Commissioner of Internal Revenue, and on the basis of the decision of the Court below it is entirely within the power of the Commissioner to reject them all for indefiniteness, notwithstanding the intent of the statute that a reward would be paid.

(d) Were the public in general to know that the statute and the circular letter are unenforceable, it would discourage informers from giving any information to the Government, and thus deprive the Government of the protection of the revenues afforded to it by the aid of informers.

(e) The question decided by the Court below was an important Federal question involving as it does also the validity of the Commissioner's regulation, which has the force of law, and which should be settled by this Court.

(f) The questions here presented have never been passed on by this Court.

WHEREFORE, petitioners pray that a writ of certiorari may be issued out of, and under the seal of this Court, directed to the Court of Claims of the United States, commanding that Court to certify and send to this Court, on a day certain to be designated therein, a full and complete transcript of the record of all proceedings of the said Court in this cause, to the end that the same may be reviewed and determined in this Court; and that the final order of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final order may be reversed and the Court below directed to proceed to fix and determine the fair and reasonable compensation to which the petitioners are entitled, not exceeding 10% of the recoveries made by the United States in connection with the violations as to which the petitioners' information was given; and petitioners pray for such other and further relief as to this Court may seem just and proper; and petitioners will ever pray.

Dated, New York, N. Y., May —, 1941.

SAMUEL J. KATZBERG, LOUIS HAIG
and JACOB F. SCHMITT,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1075

SAMUEL J. KATZBERG, LOUIS HAIG AND JACOB F. SCHMITT,

Petitioners,

vs.

THE UNITED STATES

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Claims is reported in Case No. 45,289, March 3rd, 1941 (91 Ct. Cls. —). A certified copy of the decision may be found at R. 5.

(A) The Statutory Provision Believed to Sustain Jurisdiction to Review the Judgment.

The statutory provision believed to sustain jurisdiction to review the judgment is Sec. 3 (b) of the Act of February 13, 1925; 43 Stat. 939.

(B) The Date of the Judgment Sought to Be Reviewed.

The judgment sought to be reviewed was entered in the office of the Clerk of the Court of Claims on March 3rd, 1941 (R. 6).

(C) The Statute Involved.

The statute involved is Section 1242 of Title 26 of the U. S. Code; Section 3463 Revised Statutes, and Internal Revenue Regulation No. 99-5th Revision (Department Circular No. 147 of 1899).

The regulation has the force of law. (*Ex parte Reed*, 100 U. S. 13; *U. S.* v. *Moorehead*, 243 U. S. 607).

(D) Statement of the Case.

The petitioners seek the review of a judgment of the Court of Claims of the United States entered on March 3rd, 1941, sustaining a demurrer to the petition of petitioners in the Court below on the ground that the petition did not state facts furnishing any ground of relief against the United States. A detailed statement of the facts upon which the cause of action is founded, is contained in the petition which may be found in the record (R. 2-4).

ARGUMENT.

I.

The Contract Alleged in the Petition Was Not Void for Want of Definiteness.

The validity of petitioners' cause of action has been challenged by the Attorney General upon the ground that the defendant has not by the terms of the offer obligated itself to pay any award; that there was no mutuality in the contract; and that even if it be assumed that there was mutuality, the definiteness and certainty requisite for a contract are lacking because no fixed amount was stated in the offer of reward.

(a) The contract formed by an offer of a reward and its acceptance, is the promise by the offerer given on the one side and performance by the offeree on the other. This

rule of law is so well settled that citation of authorities would constitute supererogation.

> "The general rules governing the interpretation or construction of contracts apply to rewards. As the contract depends wholly upon the offer and its acceptance by performance, its legal import and effect must be determined by the terms of the offer, fairly, liberally and reasonably construed according to the intention of the offerer as manifested in the offer itself in the light of surrounding circumstances" (54 C. J. 783, Sec. 18).
>
> "Statutes offering rewards are ordinarily liberally construed so as to effectuate their purpose" (54 C. J. 783, Sec. 20).

(b) The contract was definite and certain in that it offered to pay "such reward as the Commissioner of Internal Revenue may deem suitable, but in no case exceeding 10% of the net amount of fines * * * recovered by suit or otherwise, etc." It meant that a reward would be paid, and fixed 10% as the ceiling. It was not vague or indefinite that an award would be paid, nor do the words "as the Commissioner of Internal Revenue may deem suitable" condemn the contract, nor does the failure to set up a fixed amount in the offer affect its validity. However, even if the provision for compensation in the circular letter is indefinite and uncertain, it by no means follows that a recovery may not be had.

The statute conferred the power to offer a reward to informers without specifying the amount. It is entitled "Expenses of Detection and Punishment of Frauds", and authorizes the Commissioner, with the approval of the Secretary of the Treasury, to pay such sums, "not exceeding the sum appropriated therefor", as he may deem necessary for detecting or bringing to trial persons guilty of violating the internal revenue laws or conniving at the same.

On March 15, 1934, Congress made an appropriation for the year ending June 30, 1935, for the Bureau of Internal

Revenue, which appropriation included $100,000 to be disbursed in the District of Columbia to pay for "detecting and bringing to trial persons guilty of violating the Internal Revenue laws, including payments for information leading to the detection of such violators". (Ch. 70, Acts of Congress March 15, 1934, pages 430-1). Thus Congress appropriated the money to pay the award, and all that the Commissioner had to do was to make it certain and definite by fixing the amount.

We respectfully submit that if the contention of the defendant is sound that the offer embraced in the circular letter is indefinite and uncertain in failing to state the amount to be paid, then the petitioners are entitled to recover the fair and reasonable value of their services, since the defendant has accepted the benefit of petitioners' performance.

The offer, even if indefinite as to the exact compensation, contained an implied promise that if the defendant accepted petitioners' services the Commissioner in good faith would make an honest estimate of a suitable reward. This the Commissioner failed to do, but arbitrarily rejected the claim without a hearing.

Let us assume for the sake of argument that the offer fixed no percentage or any amount that the Commissioner "might deem suitable". Such an offer necessarily carried with it am implied promise that if petitioners rendered services in response to the offer, and the services were accepted by the defendant and were beneficial to it, that the Commissioner would in good faith make an honest and reasonable estimate of the amount of the reward that would be suitable under the circumstances.

In discussing the doctrine of implied promises, Cardozo, J., in *Wood* v. *Duff-Gordon,* 222 N. Y. 88, at p. 90, said:

> "It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We

> think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation', imperfectly expressed."

In *Butler* v. *Winona Mill Co.*, 28 Minn. 205, 9 N. W. 697, the defendant employer reserved the right to pay plaintiff such wages as it considered "right and proper". The Court said that under those circumstances the defendant was under a duty "to determine and fix the amount of the compensation honestly and in good faith".

In *Tennant* v. *Fawcett* (Tex. Civ. App.) 55 S. W. 611, the defendant had reserved the right to fix the fees of the plaintiff. The court said that the defendant was obligated to fix a fair and reasonable fee.

In *Von Reitzenstein* v. *Tomlinson,* 249 N. Y. 60, cited in the court below by the defendant, it was held that a contract calling for "an appropriate percentage of the profits" was void for indefiniteness, but the court nevertheless said at page 67:

> "The plaintiff should be paid for his work according to the standard of the market, or, in the absence of such a standard, according to such fair approach thereto as may be found to be attainable."

See also *Bryant* v. *Flight,* 5 M. & W. 114.

In the case at bar defendant has arbitrarily rejected petitioners' claim and has refused to determine and fix a suitable reward for them. Under such circumstances we submit that petitioners are entitled to recover the reasonable value of their services.

We submit that after petitioners had performed, defendant may not defeat their right to compensation by arbitrarily refusing to exercise an honest judgment in fixing a suit-

able reward. If the Commissioner was guilty of such arbitrary conduct, and the demurrer admits that he was, then the law will impose an obligation, implied in fact, to pay the reasonable value of petitioners' services. This duty of reasonable conduct, so as not to defeat recovery, is not unusual in the law. Thus a promise to pay for performance which is "satisfactory to the promissor" has been uniformly held to imply a duty to examine the performance and give fair and honest consideration to the matter. The law will not tolerate arbitrary rejection as the means of avoiding liability.

III, Williston on Contracts, 1937 Revised Ed. Sec. 675-A;
Restatement of the Law of Contracts, Secs. 265, 794.

It is one thing to hold invalid an executory contract by reason of the indefiniteness of the promise. It is another to disclaim liability for services performed on the ground of indefiniteness of the compensation, where if the promissor had acted in good faith and exercised an honest judgment such indefiniteness would have been removed. Defendant by its arbitrary refusal to act may not defeat petitioners' right to recovery.

II.

Even if the Contract is Too Indefinite for Enforcement Because it is Lacking in the Amount to be Paid, Petitioners are Entitled to Recover Upon a Quantum Meruit.

This principle is well settled in the law.
N. Y. C. & H. R. R. Co. v. *Gray,* 239 U. S. 583 at p. 587;
Winton v. *Amos,* 255 U. S. 373 at p. 392;
Plattenberg v. *Briggs,* 166 App. Div. (N. Y.) 326;
Winch v. *Warner,* 186 App. Div. (N. Y.) 710;
Bluemner v. *Garvin,* 120 App. Div. (N. Y.) 29.

In *Winton* v. *Amos,* 255 U. S. 373, which was an appeal from the Court of Claims, this Court said at p. 392:

> "The fact that in the present case the services were rendered under contract with particular Indians, whether valid or invalid, is no obstacle to a recovery. Services not gratuitous, and neither malum in se nor mala prohibita, rendered under a contract that is invalid or unenforceable, may furnish a basis for an implied or constructive contract to pay the reasonable value."

III.

The Matter of Payment of Rewards to Informers Does Not Lie in the Favor of the Government, But is Compensation for Value of Services Rendered.

As was said by the Comptroller General (Vol. 5, Dec. Compt. Gen. 665):

> "Payment for information so furnished as to violations of the Customs laws are not personal gratuities, but are rather in the nature of compensation for services rendered and have a direct relation to the benefit derived from such information by the United States. * * * The compensation having been earned by furnishing information resulting in a recovery, the right to file a claim therefor becomes vested in the informer."

And in 26 Dec. Compt. of the Treasury 531, at page 532, the Comptroller General said:

> "The purpose of the law is to encourage by appropriate reward persons not in the Federal service to assist the Government in the detection and suppression of fraud upon the Customs revenue * * *."

And in 3 Dec. Compt. Gen. 499, the syllabus of the decision of the Comptroller General is as follows:

> "An informer who furnishes the first information resulting in the recovery of taxes unlawfully withheld is entitled under Sec. 3463, Revised Statutes, and the

Act of Mar. 3, 1921 (41 Stat. 1274) to a reasonable reward approved by the Secretary of the Treasury and not exceeding 10% of the amount recovered."

IV.

The Court of Claims Has Jurisdiction of a Contract Implied in Fact, and it is Immaterial that the Petition Did Not Proceed on the Theory of a Quantum Meruit.

Jurisdiction of the Court of Claims:

(a) The court below has jurisdiction of an action on contract, express or implied, or for damages liquidated or unliquidated, in cases not sounding in tort.

Act of Congress March 3, 1887, Ch. 399, Sec. 1; 24 Stat. 505;

Act of Congress March 3, 1911, Ch. 231, Sec. 145; 36 Stat. 1136.

(b) It is no objection that the petition proceeded upon the theory of fixed damages. The petitioners are entitled to recover upon a *quantum meruit* if they cannot prove fixed damages.

In *Sussdorf* v. *Schmidt*, 55 N. Y. 319, at p. 324, the court held that upon a complaint to recover alleged agreed compensation for services, a recovery upon proof of, and for the value of the services, is sustainable. At most it is a variance between the pleadings which may be disregarded unless it appears that the defendant has been misled.

See also

Phoenix Security Company v. *Dittmar*, 224 Fed. (C. C. A.) 892, at p. 893;

Chesapeake & Ohio R. R. Co. v. *Knapp*, 34 U. S. (9 Pet.) 541, at p. 565;

Lockhart v. *Hamlin*, 190 N. Y. 132, at p. 137;

Rubin v. *Cohen*, 129 App. Div. (N. Y.) 395;

Shirk v. *Brookfield*, 77 App. Div. (N. Y.) 295.

A variance between the pleading and the proof which does not mislead or surprise is unavailing.

Erie R. R. Co. v. *Kennedy,* 191 Fed. 332, 112 C. C. A. 76;

Waters v. *Guile,* 234 Fed. 532, 148 C. C. A. 298.

V.

The Petition Below Sets Forth Sufficient Grounds Entitling the Petitioners to Relief Against the Defendant.

The argument was made in the court below by the Attorney General that in no event can the petitioners recover because the information furnished by them was not original information; that since the information had first been furnished to a customs officer at the Port of New York, the information became the property of the defendant and the petitioners could not recover. However, the petition alleges (R. 2), that on November 27, 1934, the petitioners gave original information of frauds upon the customs to a customs officer at the Port of New York, and at the same time to the Secretary of the Treasury. The petition also alleges that at petitioners' request and in the due course of his procedure, the customs officer at the same time notified the Internal Revenue office of the frauds perpetrated by the importers, with the view of investigating possible frauds of said importers upon the Internal Revenue laws of the defendant, and detecting and bringing to trial and punishment persons guilty of violating or conniving at the same (R. 2); and that in January, 1935, petitioners advised the customs officer as well as the Intelligence Bureau of the Collector of Internal Revenue, that the importers had covered up their frauds upon the customs by committing frauds upon the internal revenue, and specifically referred to the returns of the importers for the years 1932 to 1934 (R. 2-3).

Thus it appears that the information was not only given

to a customs officer on November 27, 1934, with a request that he pass the information on to the Internal Revenue office, but also to the Collector of Internal Revenue in January 1935.

The argument that the information became the property of the Government when first made to the customs officer and therefore cannot form the basis of a claim for reward for information respecting internal revenue frauds, is without any basis. The Customs Service and the Internal Revenue Service are not separate branches of separate governments; both are tax collection agencies of the same government, one collecting customs duties, and the other income and death taxes, and other revenues.

In a somewhat similar case the Comptroller General ruled that an informer who gave information to an officer of the U. S. Drug Inspection Service was entitled to a reward for first information under Sec. 4 of the Act of 1874, where that officer communicated the information to the Drug Inspection Service.

> "If the initial step leading to a recovery is taken by a chief officer of the Customs as a result of information communicated to him through the chief officer of another branch of the Government service, I see no reason why the original informer should not receive the compensation authorized, provided the circumstances under which the original information was furnished were such as to justify an award.
>
> "The purpose of the law is to encourage * * * persons * * * to assist the Government in the detection and suppression of fraud upon the customs revenue, and to withhold the reward in a meritorious case merely because the information was not furnished directly to the proper officer would tend to defeat rather than promote that purpose." (Vol. 26, Dec. Compt. of the Treasury 531, at p. 532.)

For the purposes of the demurrer the allegations of the petition must be taken as true, and from them it appears that not only was the information given by the plaintiffs to the Customs officer, but also to the Intelligence Bureau of the Collector of Internal Revenue (R. 2-3).

The Secretary of the Treasury allowed, and in large part paid, a claim by the petitioners for reward for the customs information, and there can be no objection to their recovering a reward for the internal revenue information. There is nothing in either Section 619 of the Tariff Act of 1930, or in Section 3463 of the Revised Statutes, precluding the informer from earning a reward for both, if the information as to each was original.

It is respectfully submitted that the writ should be allowed as prayed for.

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(4470)

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 97

SAMUEL J. KATZBERG, LOUIS HAIG AND JACOB F. SCHMITT, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 5–6) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 3, 1941 (R. 6). A motion for leave to file an amended petition was denied on April 12, 1941 (R. 7). The petition for a writ of certiorari was filed May 21, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, 28 U. S. C., Supp. V, § 288.

QUESTION PRESENTED

Whether, after a claim for reward has been rejected by the Commissioner of Internal Revenue, an informer may recover in the Court of Claims the value of services rendered pursuant to Internal Revenue Circular No. 99, 5th Revision.

STATUTES INVOLVED

Revised Statutes, Section 3463, and Internal Revenue Circular No. 99, 5th Revision, are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

On October 28, 1940, petitioners sued in the Court of Claims to recover from the United States 10% of the amount recovered by the United States for violation of the Internal Revenue laws by reason of information which petitioners allegedly furnished to the United States. A demurrer to the petition was sustained (R. 6). The facts, as alleged in the petition, are as follows:

The United States offered a reward for information leading to the detection and punishment of persons violating the Internal Revenue laws, the amount of the reward to be such as the Commissioner of Internal Revenue "may deem suitable" (R. 1).[1] Thereafter, on November 27, 1934,

[1] Section 3463 of the Revised Statutes, 26 U. S. C. § 3792, authorized the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to pay such sums, "not exceeding in the aggregate the sum appropriated there-

petitioners gave original information to a customs officer at the Port of New York and to the Secretary of the Treasury, of certain frauds committed upon the customs revenue by the named importers (R. 2). At the request of the petitioners and in the due course of his procedure in such cases, a customs officer notified the Internal Revenue office of the perpetrated frauds, with the view of having possible frauds upon the Internal Revenue laws investigated (R. 2). In January 1935, petitioners orally and in writing advised customs officers and the Intelligence Bureau of the Collector of Internal Revenue, at the County of New York, that the importers had not only been guilty of customs frauds but had also violated the Internal Revenue laws (R. 3). The information furnished to the customs officers led to the recovery by the United States of unlawfully withheld customs duties, and an award was allowed and paid petitioners by the Secretary of the

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for, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws * * *." Pursuant to this statute, the Commissioner, with the approval of the Secretary, issued Internal Revenue Circular 99, 5th Revision, in which he offered "for information given by persons other than officers of internal revenue * * * that shall lead to the detection and punishment of persons guilty of violating the internal revenue laws * * * such reward as the Commissioner of Internal Revenue may deem suitable, but in no case exceeding 10 percent of the net amount of fines, penalties, forfeitures, and taxes, which by reason of said information shall be recovered * * *."

Treasury pursuant to Section 619 of the Tariff Act of 1930 (R. 3). The information also led to the detection and punishment of the importers for violation of the Internal Revenue laws, and to the recovery of fines, penalties, forfeitures, and taxes in the sum of $50,000 accepted in compromise by the Commissioner of Internal Revenue. Petitioners filed claim for a reward with the Commissioner of Internal Revenue (R. 3) which the Commissioner rejected (R. 4). This rejection is alleged to have been arbitrary and capricious (R. 4).

In sustaining the demurrer, the court below followed its prior decision in *Gordon* v. *United States,* Court of Claims, No. 45170, decided February 3, 1941, and held that the promise to pay such amount as the Commissioner might honestly deem "suitable" was too indefinite to be enforceable and that a promise to pay the reasonable value of the services rendered could not be implied (R. 6).

ARGUMENT

1. The decision of the court below is clearly correct. The offer set forth in Internal Revenue Circular No. 99, 5th Revision, was to pay "such reward as the Commissioner of Internal Revenue may deem suitable." The Commissioner having rejected the petitioners' claim, no recovery may be had on the express promise. Cf. *Butler* v. *Winona Mill Co.*, 28 Minn. 205. The offer, it

is true, implied a promise in fact that the Commissioner would make an honest determination. But no recovery may be had for the breach thereof, even assuming that the Commissioner's rejection of the claim was arbitrary and capricious, since, as the court below observed (R. 6), "no definite or ascertainable sum was offered" and the courts have "no way of knowing" what sum the Commissioner would have deemed suitable if he had exercised his honest discretion. Cf. *Von Reitzenstein* v. *Tomlinson,* 249 N. Y. 60; *Roberts* v. *Smith,* 4 H. & N. 315; Williston, Contracts (Rev. ed. 1936) § 43 *et seq.*[2]

Nor may recovery be had for the "reasonable value" of the services rendered. The express offer to pay such amount as the Commissioner deemed "suitable" negatived any promise implied in fact to pay a "reasonable" amount. *Butler* v. *Winona Mill Co., supra; Tennant* v. *Fawcett,* 94 Tex. 111, reversing 55 S. W. 611 (Tex. Civ. App.) cited by petitioners; *Roberts* v. *Smith, supra; Vlachos* v. *United States,* 90 C. Cls. 165, 172.

[2] Nominal damages may be recovered, of course, for breach of a valid contract to make an honest determination, but petitioners make no contention that the court below erred in failing to hold that petitioners stated a cause of action for nominal damages. Moreover, the allegation that the Commissioner acted "arbitrarily" and "capriciously" (R. 4) in rejecting petitioner's claim is a legal conclusion, not admitted by the demurrer (cf. *Silberschein* v. *United States,* 266 U. S. 221, 225), and, as may be inferred from other allegations of the petition (R. 3), there were reasonable grounds upon which the Commissioner may have acted.

And while such a promise may be implied in law in an action between private parties (*Kearns* v. *Andree,* 107 Conn. 181), it is well settled that the "Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law." *Merritt* v. *United States,* 267 U. S. 338, 341; *United States* v. *Minnesota Mutual Inv. Co.,* 271 U. S. 212, 217.[3] In *Winton* v. *Amos,* 255 U. S. 373, cited by petitioners, a special act of Congress expressly authorized the Court of Claims to hear, consider, and adjudicate the claims of plaintiffs against the Choctaw Indians for services rendered and "to render judgment thereon on the principle of quantum merit in amounts equitably and justly due." The other cases cited by petitioners as authority for recovery upon a quantum meruit (Pet. 14) are likewise not in point. In none of them did the express promise negative a promise implied in fact to pay "reasonable" compensation, and none of the actions were instituted under the Tucker Act.

The decision below may be supported on another equally conclusive ground. The statute

[3] Accord: *Alabama* v. *United States,* 282 U. S. 502; *Merritt* v. *United States,* 267 U. S. 338; *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592; *Tempel* v. *United States,* 248 U. S. 121; see *United States* v. *Algoma Lumber Co.,* 305 U. S. 415, 418–419.

(Revised Statutes, Sec. 3463) pursuant to which the Internal Revenue Circular was issued expressly requires the approval of the Secretary of the Treasury as a condition of any payment, a requirement which has always been considered to apply to the payment of each specific award even though the general offer in the Circular has received the Secretary's approval. 15 Op. Atty. Gen. 133 (1876). It is not alleged that the Secretary has approved the payment of any sum to petitioners. In these circumstances no payment is authorized and no recovery may be allowed. *United States* v. *Crosthwaite,* 168 U. S. 375; *Vlachos* v. *United States,* 90 C. Cls. 165.

2. No question of importance is involved. Although Circular No. 99 in substantially its present form has been in effect for at least sixty-five years and numerous claims for rewards thereunder have been rejected (See, e. g., Annual Report of the Commissioner of Internal Revenue, 1940, p. 49), the contention that recovery could be had under the Tucker Act after a rejection by the Commissioner was apparently first advanced in the *Gordon* case, decided February 3, 1941. So far as we are aware, the question is not involved in any other case now pending.

CONCLUSION

The decision of the court below is correct. There is no conflict and no question of importance is

involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1941.

APPENDIX

Section 3463 of the Revised Statutes (26 U. S. C., Supp. V, § 3792) provides as follows:

> § 3463. *Expenses of detection and punishment of frauds.*—The Commissioner, with the approval of the Secretary, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law.

Internal Revenue Circular No. 99, 5th Revision, provides as follows:

> Under and by virtue of the provisions of Section 3463 of the Revised Statutes of the United States, which authorize the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to pay such sums as he may deem necessary, not exceeding in the aggregate the sum appropriated therefor, for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at violations of the same, in cases where such expenses are not otherwise provided for by law, I do hereby, with the approval of the Secretary of the Treasury, offer for information given by persons other than officers of internal revenue, or persons appointed or employed in, or acting in connection with, the Internal

Revenue Service, that shall lead to the detection and punishment of persons guilty of violating the internal revenue laws, or conniving at the same, whether such punishment be by fine or other pecuniary mulct or penalty, or by forfeiture of property, such reward as the Commissioner of Internal Revenue may deem suitable, but in no case exceeding 10 percent of the net amount of fines, penalties, forfeitures, and taxes, which by reason of said information shall be recovered by suit or otherwise and actually paid to the United States, or of any sum which shall be accepted in compromise by the Commissioner of Internal Revenue and received by the United States: *Provided,* That nothing herein contained is intended, or shall be held, to refer to information concerning special taxes, nor taxes on legacies, unless under special arrangement authorized by the Commissioner of Internal Revenue: *And provided further,* That nothing herein contained is intended or shall be held to relate to information concerning violations of the National Prohibition Act.

The reward hereby offered will be paid in cases which are settled in Court, upon the duly authenticated certificate of the United States District Attorney having charge of the case or cases, that the person claiming is the person who furnished the information which led to the detection and punishment of the violations of law for which the recovery was had, and upon such other and additional proofs as the Commissioner may require.

In cases in which property seized, being of the appraised value of $500 or less, is disposed of by the Collector under the pro-

visions of Section 3460 of the Revised Statutes, the certificate of the Collector to that fact will be received, and also to the fact that the person claiming the reward is the person who furnished the information leading to such a foreiture.

The rewards hereby offered must be understood to be limited in their aggregate to the sum appropriated therefor.

Claims for reward under the provisions of this circular should be made on Form No. 211, which will be furnished by Collectors of Internal Revenue on request therefor.

D. H. BLAIR,
Commissioner.

Approved,
A. W. MELLON,
Secretary of the Treasury.

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